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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

In the Matter of Establishment Inspection of:
HERN IRON WORKS, INC.,
Petitioner,

v.

RAYMOND J. DONOVAN,
Secretary of Labor, U.S. Department of Labor,
Respondent,

and

In the Matter of Establishment Inspection of:
LEWIS YOUNGSTROM, an individual, doing business as
YOUNGSTROM'S LOG HOMES,
Petitioner,

v.

U.S. Department of Labor,
Occupational Safety and Health Administration,
Respondent.

PETITION FOR WRITS OF CERTIORARI BEFORE AND AFTER JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Plaintiff-Respondent,

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In the Matter of Establishment Inspection of:
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Defendant-Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR,
Occupational Safety and Health Administration,

Plaintiff-Respondent.

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PETITION FOR WRITS OF CERTIORARI TO REVIEW CASES BOTH BEFORE AND AFTER JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit to review the case of *Hern Iron Works, Inc. v. Donovan* after judgment, and the case of *Youngstrom v. United States Department of Labor* before judgment.

OPINIONS BELOW

Hern Iron Works, Inc. v. Donovan

The opinion of the United States Court of Appeals for the Ninth Circuit from which review is sought is reported at 670 F.2d 838 (9th Cir. 1982). A copy of this opinion is included in the Appendix as Exhibit B.

The order of contempt of the United States District Court for the District of Idaho, imposing a fine of $1,000 on defendant for refusing to obey a warrant for inspection issued by that court, is unreported. A copy of this Order is included in the Appendix as Exhibit C.

Youngstrom v. United States Department of Labor

The order of contempt of the United States District Court for the District of Idaho, dated April 20, 1981, and imposing a fine of $500 for defendant's refusal to comply with a warrant for inspection, is not reported. A copy of this Order appears in the Appendix as Exhibit D.

Although this Contempt Order has been appealed to the United States Court of Appeals for the Ninth Circuit, no judgment or opinion has been issued by the Court of Appeals.

JURISDICTION

Hern Iron Works, Inc. v. Donovan

This is a contempt action for petitioner-defendant's refusal to obey a warrant for inspection issued pursuant to 29 U.S.C. § 657(a) (1970). Jurisdiction of the district court is founded upon 28 U.S.C. § 1331 (1980).

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Ninth Circuit after judgment is founded upon 28 U.S.C. 1254(1) (1976). Judgment was entered in the Court of Appeals on March 1, 1982.

No motion for rehearing was filed.

Youngstrom v. United States Department of Labor

Petitioner-defendant was held in contempt of court for refusing to obey a warrant for inspection issued pursuant to 29 U.S.C. § 657(a) (1970). Jurisdiction of the district court is founded upon 28 U.S.C. § 1331 (1980).

Jurisdiction of this Court to issue a Writ of Certiorari to review the decision of the United States District Court for the District of Idaho, pending judgment by the United States Court of Appeals for the Ninth Circuit, is founded upon 28 U.S.C. § 1254(1) (1976). Judgment was entered in the district court on April 17, 1981, and Notice of Appeal to the United States Court of Appeals for the Ninth Circuit was filed on June 10, 1981. Since this case has been properly docketed in the court of appeals, it comes within 28 U.S.C. § 1254(1).

No judgment or opinion has been issued by the United States Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

U.S. Const. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Subsection 8(a) of the Occupational Safety and Health Act, 29 U.S.C. § 657(a), provides:

> (a) in order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized —
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, *any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein*, and to question privately any such employer, owner, operator, agent or employee. (emphasis added).

Subsection 8(f)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 657 (f)(1), provides:

> (f)(1) any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees refered to therein shall not appear in such copy or any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to

believe such violation or danger exists, *he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists.* If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination. (emphasis added).

OSHA Regulation at 29 C.F.R. § 1903.11(b) provides:

(b) If upon receipt of such notification the Area Director determines that the complaint meets the requirements set forth in paragraph (a) of this section, and that there are reasonable grounds to believe that the alleged violation exists, he shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. *Inspections under this section shall not be limited to matters referred to in the complaint.* (emphasis added).

STATEMENT OF THE CASES

Hern Iron Works, Inc. v. Donovan

The Ninth Circuit in this case held that "wall-to-wall" inspections which are conducted pursuant to employee complaints under subsection 8(f) of the Occupational Safety and Health Act are generally permitted. 670 F.2d at 841.

Hern Iron Works, Inc. (Hern) operates a foundry and business in Coeur d'Alene, Idaho. An Application for Reissuance[1] of an Inspection Warrant to inspect the Hern premises was filed by the Secretary before Judge Ray McNichols in the United States District Court for the District of Idaho on June 17, 1980. App., Exh. E. The Application asks that an inspection warrant issue pursuant to an inspection program authorized under subsection 8(a) of the Occupational Safety and Health Act (the Act), and to an employee complaint under subsection 8(f) of the Act. Yet, the Application does not allege any facts indicating that the defendant's establishment was selected pursuant to reasonable administrative standards or on the basis of information derived from

[1] Two former warrants were defeated on procedural grounds.

neutral sources as required under subsection 8(a). The Secretary's warrant application was accompanied by the affidavit of an OSHA compliance officer, which clearly indicates that there are more than two buildings located on the Hern premises. App., Exh. F.

The employee complaint upon which the Secretary founded his Application for Reissuance of an Inspection Warrant alleges two distinct violations, and particularly describes the building or worksite where the alleged violations are located as being the "metal pouring section of the plant" and "the foundry area" (both refer to the same section of the same building). App., Exh. G. The reference to the metal-pouring section of the plant in the Complaint, to the "worksite and business" in the Secretary's warrant application, and to the various buildings on the premises in the compliance officer's affidavit, provided the issuing judge with sufficient information to determine that there was more than one building located on the Hern premises.

Judge McNichols issued a warrant for inspection on June 16, 1980, which made no reference to the fact that it was issued pursuant to an employee complaint, but rather purported to be pursuant to subsection 8(a) of the Act relating to inspection programs. App., Exh. H. This warrant authorized a "wall-to-wall" inspection of the entire Hern premises. When served with this warrant by the compliance officer, Mr. Hern refused to permit the inspection.

Appearing pro se before Judge McNichols during the Contempt Hearing, Mr. Hern stated as his reasons for refusing the inspection, inter alia, that it was unconstitutional since it was overly broad in scope and bore no relation to the employee complaint upon which it was based. *Hern* TR. 50. Judge McNichols nevertheless held Hern in contempt of court, *Hern* TR. 61-62, and imposed a fine of $1,000, later suspended pending appeal. *Hern* TR. 64.

On appeal to the United States Court of Appeals for the Ninth Circuit, the Order of the district court was affirmed. Holding that the Hern warrant was proper in scope, the court of appeals concluded that the Judge could have reasonably inferred that a general inspection was necessary to determine the existence of the alleged violations since there was no information before

him indicating that the Hern foundry was a multi-faceted establishment, 670 F.2d at 841, and that in any case, "wall-to-wall" inspections were generally permitted in response to employee complaints. *Id.*

Youngstrom v. United States Department of Labor

The relevant facts are undisputed. Lewis Youngstrom, doing business in Blackfoot, Idaho as Youngstrom's Log Homes, manufactures machine logs for dwellings. On the basis of an employee complaint, the Secretary filed an Application for a Warrant before Judge McNichols in the United States District Court for the District of Idaho, requesting authorization to conduct a general inspection of Youngstrom's entire business premises. App., Exh. I. Youngstrom's premises consist of an office building, a storage area, and several other buildings situated on eighteen acres. Testimony of Youngstrom, *Youngstrom* TR. at 7-8. Accompanying the Application was the affidavit of an OSHA compliance officer attesting to the fact that the requested inspection was made pursuant to an employee complaint. App., Exh. J. The complaining employee injured his big toe in the chain of a bark-stripping machine. He later alleged, adding seven other detailed complaints, that the log stripping machine was missing a chain guard. App., Exh. K.

A warrant authorizing a general "wall-to-wall" inspection issued from the district court on December 1, 1980. App., Exh. L. This warrant made no reference to the employee complaint, but rather purported to issue pursuant to a general inspection program under subsection 8(a) of the Act. When the compliance officer attempted to serve the warrant, Youngstrom refused to permit an inspection. He had previously refused to permit a *warrantless* inspection because its scope was not limited to the machine where the employee had allegedly hurt his foot. In declining to permit inspection pursuant to the warrant, Youngstrom maintained his position that the desired search was overbroad. At all times Youngstrom was willing to permit inspection of the log-stripping machine, even in the absence of a warrant. Affidavit of Haning at 3, L. 8-10 (App., Exh. J).

After a hearing before the United States District Court for the District of Idaho, defendant Youngstrom was held in contempt of court and fined $500. This fine was suspended pending appeal of the Order to the United States Court of Appeals for the Ninth Circuit. The district judge interpreted subsection 8(f) of the Act as permitting routine "wall-to-wall" inspections pursuant to employee complaints, and reasoned that since the warrant in question was therefore valid, it should have been obeyed. *Youngstrom* TR. at 31, L. 10-18.

Notice of appeal to the United States Court of Appeals for the Ninth Circuit was taken on June 10, 1981. No judgment or opinion has been issued by the court of appeals.

CONSIDERATIONS COMPELLING GRANT OF THE PETITION

Several federal circuit courts of appeal disagree as to the permissible scope of complaint-based warrants under both the fourth amendment and the Occupational Safety and Health Act. While the Seventh, Eighth, and Tenth Circuits hold that probable cause guarantees of the fourth amendment, as defined by this Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), require that such warrants be limited in scope whenever possible, the Fourth and Ninth Circuits authorize issuance of "wall-to-wall" warrants whenever founded upon employee complaints. Circuits deciding the issue under the Act itself are similarly split, with the Third Circuit holding in favor of limited-scope warrants and the Fourth and Ninth Circuits against. *See Chart Appearing in Appendix as Exhibit A.*

OSHA's administrative bodies have also split on the issue. Despite the Secretary's promulgation of a regulation purporting to authorize broad-scope warrants in all cases of employee complaints, the Occupational Safety and Health Review Commission has ruled that legislative intent and constitutional guarantees require that warrants sought pursuant to employee complaints be limited in scope whenever possible. This rift within OSHA's framework complicates enforcement of the Act's remedial statutes and generally undermines public confidence in federal administrative agencies.

Resolution of these conflicts is important since the issue directly affects thousands of employers and involves a fundamental right guaranteed under the fourth amendment. In order to alleviate the discord among the circuits and OSHA's administrative organs, and to promote sound public policy, it is imperative that this Court address and decide the issue in favor of warrants that are tailored in scope to the subject-matter of employee complaints.

ARGUMENT

I. THE NINTH CIRCUIT BELOW INTENSIFIES THE SUBSTANTIAL CONFLICT AMONG THE CIRCUITS CONCERNING THE PERMISSIBLE BREADTH OF COMPLAINT-BASED WARRANTS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT. *See Chart Appearing in Appendix as Exhibit A.*

In upholding the principle that warrants issued pursuant to employee complaints be tailored to the probable cause or "specific evidence of existing violations" that support them, the Court of Appeals for the Third Circuit reasons that it is the Act's language which mandates that such searches be restricted to the purpose of discovering whether complained-of violations exist. *Marshall v. North American Car Co.*, 626 F.2d 320, 323 (3rd Cir. 1980). By contrast, the Ninth Circuit in the case at bar as well as the Fourth Circuit in *Marshall v. Seaward International, Inc.*, 510 F. Supp. 314 (W.D. Va. 1980), *affirmed* 644 F.2d 880 (4th Cir. 1981), uphold the validity of routine "wall-to-wall" warrants in every case where they are founded upon employee complaints. 670 F.2d at 841; *Marshall v. Seaward International, Inc.*, 510 F. Supp. at 318. They do so on the theory that a correct interpretation of the Act reveals that such searches are envisioned under the employee complaint subsection (8(f)) as well as under the general inspection plan subsection (8(a)). *Id. See J.R. Simplot Co. v. OSHA*, 640 F.2d 1134, 1137-38 (9th Cir. 1980) (acknowledging split among circuits concerning scope of complaint-based warrants, but refusing to decide issue). The circuits are in agreement that subsection 8(a) of the Act, which pertains to general inspection programs, permits unlimited-scope warrants in most cases. *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d at 1313, 1323 (7th Cir. 1980).

Subsection 8(f)(1) of the Act, pertaining to inspections conducted pursuant to employee complaints, provides:

> If upon receipt of such notification [of employee complaints] the Secretary determines there are reasonable grounds to believe that such violation or danger exits, *he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists.* If the Secretary determines that there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

29 U.S.C. § 657(f)(1) (emphasis added).

The court below adopts the Secretary's interpretation of this subsection, which maintains that the phrase "this section" refers to subsection 8(a) in particular, and thus permits the type of "boilerplate" warrant authorized in the case of general inspection programs. 670 F.2d at 841.

The Ninth Circuit also bases its contention in this regard upon what it mistakenly perceives to be the holding of the Seventh Circuit in *Burkart Randall Division of Textron Inc. v. Marshall* that broad-scope warrants founded upon employee complaints are always constitutionally and legislatively justified. 670 F.2d at 840-41. Although at first glance it appears that the decision in *Textron* purports to authorize the routine issuance of unlimited-scope warrants whenever founded upon employee complaints, the opposite is in fact true. Each of the three presiding judges wrote an opinion in *Textron*. Although the court upheld the validity of an unlimited complaint-based warrant in that particular case, only one judge observed that such inspections need never be restricted in scope to the substance of employee complaints. While noting that the nature of the complaint in that particular case justified the issuance of a "boilerplate" warrant, the concurring judge declined to accept the proposition that unlimited-scope warrants are always permissible when based upon employee complaints. *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d at 1323. He instead found persuasive the reasoning of the dissenting opinion that unlimited-scope warrants founded upon employee complaints should never routinely issue, but rather should be tailored to fit the complaints upon which they are

based. *Id.* at 1327. Thus, a recognition of *Textron*'s true holding is significant because it shifts the balance in the split among the circuits in favor of limited-scope warrants. *See Chart Appearing in Appendix as Exhibit A.* The three *Textron* opinions also illustrate the discord, even within the same circuit, on the issues Hern and Youngstrom raise.

In *Marshall v. North American Car Co.*, 626 F.2d 320 (3rd Cir. 1980) the Third Circuit likewise adopts the position that warrants issued pursuant to employee complaints must be limited in scope. 626 F.2d at 323. It does so by interpreting the phrase "this section", which appears in subsection 8(f), as referring to the entirety of section 8 (which covers such matters as the time of the search, the method of notification, and the means of conducting the search), but with the exception of subsection 8(a). The Third Circuit contends that if subsection 8(f) were read as referring to subsection 8(a) alone, then the existence of subsection 8(f) would be superfluous. *Id.* By focusing solely on subsection 8(a), therefore, the Third Circuit held that the Secretary's argument (later adopted by the Ninth Circuit below) misreads the meaning of the phrase "in accordance with the provisions of this section." The Third Circuit instead interprets this phrase to mean simply that the procedure set out in the other subsections of section 8 will be followed even where the inspection is pursuant to an employee complaint.

II. THE LOWER COURT HOLDING CONFLICTS WITH A DECISION OF THIS COURT AND CONTRIBUTES TO THE CONTROVERSY AMONG THE CIRCUITS CONCERNING THE LEGITIMATE SCOPE OF COMPLAINT-BASED WARRANTS UNDER THE FOURTH AMENDMENT. *See Chart Appearing in Appendix as Exhibit A.*

A. *Administrative Probable Cause Supporting Inspection Pursuant to a General Plan is Not the Same as Criminal Probable Cause.*

This Court held in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) that a warrant is a prerequisite to a nonconsensual administrative search. Speaking for the Court, Justice White stated that:

> [An administrative warrant issued pursuant to a general plan of inspection] will not depend on [a demonstration of]

> probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. *For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or adminstrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."*

Id. at 320, *quoting Camara v. Municipal Court*, 387 U.S. 523, 538 (1967) (emphasis added).

This Court thus differentiates between searches conducted pursuant to general inspection plans and those conducted within the context of probable cause proof analogous to criminal investigations. In the case of general administrative searches, the standard of probable cause supporting the issuance of a valid search warrant is not based upon specific elements of incident-related proof that is embodied in the traditional sense of criminal probable cause. Instead, an applicant must show that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular establishment". *Id.* In the case of general administrative inspections, therefore, the standard of reasonableness is based upon a presumption of regularity derived from a predesigned administrative program subject to well-established safeguards. The balance is struck between "the need for the intrusion on the one hand, and the threat of disruption to the occupant on the other." *Michigan v. Tyler*, 436 U.S. 499, 507 (1978). *See Camara v. Municipal Court*, 387 U.S. 523 (1967).

B. *The Circuit Courts have Confused the Standard of Probable Cause Necessary for the Issuance of Complaint-based Search Warrants*

As noted, *Barlow's* held that administrative search warrants must be issued pursuant to either of two different standards. One standard for reasonableness is based upon an administrative plan as satisfied for a particular establishment; the other is based upon "specific evidence of an existing violation." *Marshall v. Barlow's, Inc.*, 436 U.S. at 320. Whether this second standard of cause

refers to criminal probable cause, whether it refers to administrative probable cause applicable to general inspection programs, or whether it is in fact a "hybrid" of the two, is a matter which has caused disagreement among the circuits as well as discord within OSHA's administrative framework.

1. *Probable cause supporting complaint-based warrants v. criminal probable cause.*

Proponents of the theory that warrants issued pursuant to employee complaints must be supported by criminal probable cause assume that by the phrase "specific evidence of an existing violation", the *Barlow's* Court was referring to the traditional criminal probable cause standard. *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d at 1317; *Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979). The import of this reasoning is that any warrant purporting to authorize a search which is wider in scope than that necessary to determine the legitimacy of the complaint supporting it necessarily violates fourth amendment protections against unreasonable searches, inasmuch as there exists no probable cause — administrative or otherwise — constitutionally sufficient to justify the search as it relates to areas and matters not mentioned in the complaint. *Marshall v. Central Mine Equipment Co.*, 608 F.2d 719, 720 n.1 (8th Cir. 1979); *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d at 1323, *concurring opinion* at 1326, *dissenting opinion* at 1327. *See Marshall v. W & W Steel Co.*, 604 F.2d 1322, 1326-27 (10th Cir. 1979); *Matter of Establishment Inspection of Gilbert & Bennett Manufacturing Co.*, 589 F.2d at 1335.

The Seventh Circuit has held that "specific evidence of existing violations" cannot be interpreted to refer to criminal probable cause, since the right to have the complainant's veracity guaranteed is an integral aspect of criminal probable cause which clearly does not apply in the context of administrative inspections. *Weyerheuser Co. v. Marshall*, 592 F.2d 373, 377 (7th Cir. 1979); *Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d at 1339. Although that Circuit draws this fine distinction between criminal probable cause and administrative probable cause applicable to complaint-based warrants, it nevertheless maintains that the scope of such warrants must bear an

appropriate relation to the complaints which found them. Hence the standard of probable cause supporting warrants issued pursuant to employee complaints should be interpreted as embracing exactly what this Court and the Congress said that it embraced: "specific evidence of existing violations". *Marshall v. Barlow's, Inc.*, 436 U.S. at 320. A valid warrant issued pursuant to an employee complaint must, therefore, be supported by no more nor less than "specific evidence of an existing violation". *See Weyerhauser Co. v. Marshall*, 592 F.2d at 378 (emphasizing the importance of specificity in warrants and decrying the use of "boilerplate" language in warrant applications). This standard is analogous to criminal probable cause.

2. *Probable cause supporting complaint-based warrants v. administrative probable cause*

By contrast, another line of authority holds that complaint-based warrants need only be supported by a "relaxed" administrative probable cause which is adequate to support warrants issued pursuant to general inspection programs. *See Marshall v. Seaward International, Inc.*, 510 F. Supp. 314, 317 (W.D. Va. 1980), *affirmed*, 644 F.2d 880 (4th Cir. 1981); *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d at 1318-19; *Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d at 1338. Of the circuits adopting this approach, only the court below and the Fourth Circuit uphold the routine issuance of broad administrative warrants founded upon employee complaints. *See* 670 F.2d at 840-41; *Marshall v. Seaward International, Inc.*, 510 F. Supp. at 318.

Although the Fourth, Seventh, and Ninth Circuits maintain that a "relaxed" standard of administrative probable cause applies to both types of OSHA searches, as indicated above, the Seventh Circuit nevertheless recognizes the principle of limited-scope warrants. *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d, *concurring opinion* at 1326, *dissenting opinion* at 1327. *See Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d at 1343. *Cf. Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981) (adopting *Barlow's* administrative probable cause standard as correct standard in Immigration and Naturalization Service warrants but requiring limitation in scope whenever possible). The theory underlying

the Seventh Circuit's reasoning recognizes that even the administrative probable cause standard requires that all inspections be reasonable, i.e., that the public interest in these inspections outweigh the invasion of privacy which they entail. In order to be reasonable, that circuit holds that the scope of an inspection must not exceed the scope of the evidence used to establish the cause — criminal, administrative, or otherwise — which constitutionally justifies the invasion. *Id.*

III. THE COURT BELOW EXACERBATES THE EXISTING CONFLICT BETWEEN THE SECRETARY AND THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION. *See Chart Appearing in Appendix as Exhibit A.*

A. *The Secretary's Interpretation of Section 8 Conflicts with an Occupational Safety and Health Review Commission Ruling.*

As indicated above, the Secretary interprets the language in section 8 of the Act as justifying broad-scope searches in all cases where the inspection is conducted pursuant to employee complaints. The Secretary also points to a regulation which states that warrants issued on the basis of employee complaints may authorize a search that is not limited to the area in the complaint. *See* 29 C.F.R. § 1903.11(b), (text at 4, *supra*). This conclusion directly conflicts with a ruling of the Occupational Safety and Health Review Commission (OSHRC). Although the Secretary's interpretation of the Act by virtue of his regulations are entitled to deference, *Whirlpool Corporation v. Marshall*, 445 U.S. 1, 11 (1980); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971), it may not exceed the statutory limits imposed by Congress, nor contravene opposite conclusions reached by this Court. *Marshall v. Huffhines Steel Co.*, 488 F. Supp. 988, 1000 (N.D. Tex. 1979), *affirmed*, 645 F.2d 288 (5th Cir. 1981); *Cerro Metal Products v. Marshall*, 467 F. Supp. 869, 877-79 (E.D. Pa. 1979), *affirmed*, 620 F.2d 964 (3rd Cir. 1980). Accordingly, OSHRC held that routine "wall-to-wall" inspections conducted pursuant to employee complaints are invalid.

B. *The Occupational Safety and Health Review Commission Has Ruled that Complaint-Based Warrants Must Be Limited in Scope.*

In deciding the issue of the permissible scope of warrants issued pursuant to employee complaints, the OSHRC in *Sarasota Concrete Co.*, (1979) OSHRC Docket No. 78-5264, 1979 CCH OSHD ¶ 23,839, stated that "a warrant issued solely upon an employee complaint and directed to a specific hazard is not broad enough to authorize an overall inspection". *Id.* at ¶ 23,841. *See* App., Exh. M. The OSHRC judge went on to hold that unlike the situation in *Barlow's*, there was no showing that the defendant was chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources. The Commission accordingly concluded that no probable cause was established to authorize the Secretary to go beyond the specifics detailed in the complaint supporting his application for the warrant. By adopting the Secretary's position, which clearly conflicts with the OSHRC's ruling, the court below intensifies the rift between these two OSHA organs, thereby undermining public confidence in OSHA rulings.

IV. RESOLUTION OF THE CONFLICT IS IMPORTANT TO THE GOVERNMENT AND THOUSANDS OF EMPLOYERS

A. *The Issues are of Such Importance that This Court's Decision Will Affect the Fundamental Rights of Thousands Across All Levels of Industry and Commerce.*

Thousands of employers will be affected by a final determination of the permissible scope of complaint-based warrants, which alone is sufficiently compelling to require this Court's consideration of the issue. Perhaps more compelling, however, is the nature of the question as bearing upon fundamental rights guaranteed under the Fourth Amendment of the United States Constitution. It is the intrinsic importance of this latter reason which renders a ruling by the Supreme Court imperative. Defendant Hern's "strong moral objection" to the propriety of such inspections, made with indifference to the $1,000 fine for contempt, underscores this point.

In addition to misreading *Barlow's* and the Act as authorizing routine issuance of "wall-to-wall" warrants founded upon employee complaints, the Ninth Circuit concluded that the issuing magistrate had no information indicating that the Hern foundry was a multi-faceted establishment. Thus, the court below reasoned, a broad "boilerplate" warrant was justified. There is no finding of the district court, however, which warrants the Ninth Circuit's ipse dixit inference. On its face, the warrant application instead indicates that Hern's business premises includes more than one building. Similarly, the court below misinterprets the holding of the Seventh Circuit in *Burkart Randall Division of Textron v. Marshall* concerning the permissible scope of complaint-based warrants. Such clear mistakes of law beg clarification by this Court.

B. *The Practical Effect of the Decision Below in Compounding Judicial Discord and Administrative Bickering Undermines Public Faith in Federal Judicial and Administrative Organs.*

One consequence of the lower court's decision for future litigants, at least with respect to warrants issued within the jurisdiction of the Ninth Circuit, is that employers will be at the mercy of OSHA. Any time a compliance officer receives the most trivial complaint, even when it relates to an employer whose activities are multi-faceted and geographically diversified, OSHA will be given a free hand to conduct a comprehensive search of all establishments, regardless of either the legitimacy or the particularized nature of the complaint. Moreover, if such is permitted within the context of OSHA inspections, no logical reason exists that will prevent other administrative agencies from following suit. *See Public Service Co. of Indiana, Inc. v. United States Environmental Protection Agency*, 509 F. Supp. 720 (S.D. Ind. 1981) (whether agency inspection is pursuant to general program or to employee complaint is immaterial insofar as level of probable cause required to support an EPA warrant is concerned). Consequently, building inspectors, fire inspectors, or EPA officers will be justified in conducting a comprehensive inspection of all buildings, grounds, and documents of any individual or commercial establishment, no matter how extensive, simply upon the basis of a disgruntled complainant who alleges a minor violation.

The conflict between the Secretary of Labor and the OSHRC with respect to this issue likewise compels adjudication by the highest Court in the land. Should this rift in the OSHA framework remain unattended, public faith in the structural integrity of federal administrative agencies will be eroded.

Given this quagmire of judicial discord and administrative bickering, it is vital that this Court promulgate a uniform decision in order that all employers may know where they stand, legally and constitutionally, with respect to "wall-to-wall" warrants that routinely issue pursuant to employee complaints.

CONCLUSION

For these reasons, the Petition for Writs of Certiorari should be granted.

Respectfully submitted,

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BREAKDOWN OF AUTHORITY

UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT	
COMPLAINT-BASED WARRANTS MUST BE LIMITED IN SCOPE WHENEVER POSSIBLE	**COMPLAINT-BASED WARRANTS MAY ALWAYS BE UNLIMITED IN SCOPE**
Supreme Court:	*Supreme Court:*
D.C. Circuit:	*D.C. Circuit:*
First Circuit:	*First Circuit:*
Second Circuit:	*Second Circuit:*
Third Circuit: *Marshall v. North American Car Co.*, 626 F.2d 320, 323 (3rd Cir. 1980) *Donovan v. National Bank of America, Inc.*, 516 F. Supp. 674, 678 (E.D. Penn. 1981)	*Third Circuit:*
Fourth Circuit:	*Fourth Circuit:* *Marshall v. Seaward International, Inc.*, 510 F. Supp. 314, 318 (W.D. Va. 1980), *affirmed*, 644 F.2d 880 (4th Cir. 1981)
Fifth Circuit: *Marshall v. Pool Offshore Co.*, 467 F. Supp. 978, 981 (W.D. La. 1979) *Matter of Establishment Inspection of Asarco*, 506 F. Supp. 350, 353, (N.D. Tex. 1981)	*Fifth Circuit:*
Sixth Circuit:	*Sixth Circuit:*
Seventh Circuit:	*Seventh Circuit:* *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1326 (7th Cir. 1980) (minority opinion on this issue)
Eighth Circuit:	*Eighth Circuit:*
Ninth Circuit: *Donovan v. Burlington Northern, Inc.*, 521 F. Supp. 99, 102 (D. Mont. 1981)	*Ninth Circuit:* *Hern Iron Works, Inc. v. Donovan*, 670 F.2d 838, 840-41 (9th Cir. 1982)
Tenth Circuit: *Marshall v. Trinity Industries, Inc.*, 1979 OSHD 29,038, ¶ 23,943 (W.D. Okla., Oct. 15, 1979)	*Tenth Circuit:*
Eleventh Circuit:	*Eleventh Circuit:*
OSHA: *Sarasota Concrete Co.*, 1979 OSHA ¶ 23,839 (OSH Rev. Comm'n., Sept. 9, 1979)	*OSHA:* OSHA Regulation at 29 C.F.R. § 1903.11

BREAKDOWN OF AUTHORITY

UNDER THE FOURTH AMENDMENT	
COMPLAINT-BASED WARRANTS MUST BE LIMITED IN SCOPE WHENEVER POSSIBLE	**COMPLAINT-BASED WARRANTS MAY ALWAYS BE UNLIMITED IN SCOPE**
Supreme Court: ***Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978)** ***Michigan v. Tyler*, 436 U.S. 499, 507 (1978)**	*Supreme Court:*
D.C. Circuit: ***Cf. Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981)**	*D.C. Circuit:*
First Circuit:	*First Circuit:*
Second Circuit: ***Marshall v. Wollaston Alloys, Inc.*, 479 F. Supp. 1102, 1104 (D. Mass. 1979)**	*Second Circuit:*
Third Circuit: ***Marshall v. North American Car Co.*, 476 F. Supp 698, 707 (M.D. Penn. 1979), *affirmed*, 626 F.2d 320 (3rd Cir. 1980)** ***BP Oil, Inc. v. Marshall*, 509 F. Supp. 802, 808 (E.D. Penn. 1981)** ***Donovan v. Metal Bank of America, Inc.*, 516 F. Supp 674, 679 (E.D. Penn. 1981)** ***Marshall v. Berwick Forge and Fabricating Co.*, 47[illegible] Supp. 104, 113 (M.D. Penn. 1979)** ***Marshall v. Consolidated Rail Corp.*, 1979 OSHD 29,283, ¶ 24,101 (W.D. Pa. Dec. 13, 1979)**	*Third Circuit:*
Fourth Circuit:	*Fourth Circuit:* ***Marshall v. Seaward International, Inc.*, 510 F. Supp. 314, 318 (W.D. Va. 1980), *affirmed*, 644 F.2d 880 (4th Cir. 1981)**
Fifth Circuit: ***Marshall v. Pool Offshore Co.*, 467 F. Supp. 978, 982 n. 4 (W.D. La. 1979)** ***Matter of Establishment Inspection of Asarco*, 508 F. Supp. 350, 353, (N.D. Tex. 1981)**	*Fifth Circuit:*
Sixth Circuit:	*Sixth Circuit:*
Seventh Circuit: ***Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980) (concurring opinion at 1326; dissenting opinion at 1327) (majority opinion on issue)** ***Matter of Establishment Inspection of Gilbert & Bennett Manufacturing Co.*, 589 F.2d 1335, 1343 (7th Cir. 1979), *cert. denied*, 444 U.S. 884 (1979)** ***Weyerhaeuser Co. v. Marshall*, 592 F.2d 373, 378 (7th Cir. 1979)** ***Matter of Establishment Inspection of Marsan Co., Inc., a Corp.*, 1979 OSHD 28,933, ¶23,856 (N.D. Ind., June 21, 1979)**	*Seventh Circuit:* ***Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1324 (7th Cir. 1980) (minority opinion on this issue)**
Eighth Circuit: ***Marshall v. Central Mine Co.*, 608 F.2d 719, 720 n. 1 (8th Cir. 1979)**	*Eighth Circuit:*
Ninth Circuit: ***Donovan v. Burlington Northern, Inc.*, 521 F. Supp. 99, 102 (D. Mont. 1981)**	*Ninth Circuit:* *Hern Iron Works, Inc. v. Donovan*, 670 F.2d 838, 840-41 (9th Cir. 1982)
Tenth Circuit: ***Marshall v. Wand W Steel Co., Inc.*, 604 F.2d 1322, 1326-27 (10th Cir. 1979)** ***Marshall v. Trinity Industries, Inc.*, 1979 OSHD 29,038, ¶ 23,943 (W.D. Okla., Oct. 15, 1979)**	*Tenth Circuit:*
Eleventh Circuit:	*Eleventh Circuit:*
OSHA: ***Sarasota Concrete Co.*, 1979 OSHD 28,917, ¶ 23,839 (OSH Rev. Comm'n., Sept. 9, 1979)**	*OSHA:* **OSHA Regulation at 29 C.F.R. § 1903.11**

EXHIBIT B

In the Matter of Establishment of Inspection of:
HERN IRON WORKS, INC.,
Respondent-Appellant,

v.

Raymond J. DONOVAN,
Secretary of Labor, U.S. Department of Labor,
Petitioner-Appellee.

No. 80-3440

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 8, 1981.
Decided March 1, 1982.

Employer appealed from contempt order entered against it by the United States District Court for the District of Idaho, Ray McNichols, J., for failure to honor an Occupational Safety and Health Administration warrant. The Court of Appeals, Skopil, Circuit Judge, held that: (1) probable cause for issuance of inspection warrant was not stale, and (2) inspection warrant was not overbroad.

Affirmed.

1. Labor Relations ⇐ 32

Inspection warrant issued under the Occupational Safety and Health Act based upon an employee complaint issued 15 months earlier was not based on stale probable cause particularly since employer, through its own occlusive tactics, was chiefly responsible for 15-month delay of which it complained. Occupational Safety and Health Act of 1970, § 8(f)(1), 29 U.S.C.A. § 657(f)(1).

2. Labor Relations ⇐ 32

An employee complaint alleging safety hazards in "metal pouring area" of employer foundry supported warrant to search entire foundry in light of fact that affidavit verifying employee complaint alleged safety hazards including ventilation defects in

foundry and magistrate could reasonably have inferred that inspection of entire establishment was necessary to detect ventilation hazards and there was no information before the magistrate indicating that foundry was a multifaceted establishment or that it was of such a large size that full-scale inspection of premises was unreasonable. Occupational Safety and Health Act of 1970, § 8(f)(1), 29 U.S.C.A. § 657(f)(1).

Terry E. Coffin, Runft & Longeteig, Boise, Idaho, for respondent-appellant.

Ann D. Nachbar, Charles I. Hadden, Allen H. Feldman, T. Timothy Ryan, Jr., Benjamin W. Mintz, Washington, D. C., for petitioner-appellee.

Appeal from the United States District Court for the District of Idaho.

Before KILKENNY, GOODWIN, and SKOPIL, Circuit Judges.

SKOPIL, Circuit Judge:

Hern Iron Works appeals a contempt order entered against it for failure to honor an OSHA inspection warrant. The contempt order is affirmed.

FACTS AND PROCEEDINGS BELOW

Hern Iron Works, Inc., ("Hern") operates a foundry in Coeur d'Alene, Idaho. On March 23, 1979 a Hern employee filed a complaint with the Occupational Safety & Health Administration ("OSHA").[1] The complaint alleged that (1) employees in the metal pouring section of the plant were required to pour molten metal without instructions, and without protective clothing, or equipment, and (2) there was no ventilation in the foundry area.

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[1] The complaint was filed pursuant to 29 U.S.C. § 657(f)(1) (§ 8(f) of the Occupational Safety & Health Act of 1979).

Because Hern had a history of not consenting to OSHA inspections,[2] the government obtained a full scope inspection warrant. When the warrant was served on April 18, 1979, Hern denied entry to OSHA officer Ronald Stokes. In early June 1979, the Department of Labor applied for an enforcement order. The district court denied the order because the warrant had been improperly issued to John Hern rather than to Hern Iron Works, Inc.

OSHA obtained a second warrant on June 22, 1979 based on the employee complaint of March 1979. When Hern refused to honor the warrant, the Department of Labor in August 1979 applied for an order to show cause re contempt. After postponements of nearly nine months, none due to the government, a hearing was held on June 9, 1980. Again the district court declined to find contempt—this time because of improper service of the warrant.

On June 16, 1980 the government again obtained a full scope warrant based on the employee complaint of March 1979. When served with the warrant, Mr. John Hern stated that he would "sell [his] place" before allowing an OSHA inspection. At a hearing on August 11, 1980 Hern, appearing pro se, repeated "strong moral objections to the OSHA Act." He argued that there was no probable cause for issuance of a warrant, and that the warrant was overbroad.

A contempt order issued and Hern was fined $1,000. After obtaining a stay pending appeal, Hern filed timely notice of appeal on August 14, 1980.

ISSUES

1. WAS THE JUNE 16, 1980 INSPECTION WARRANT BASED UPON STALE PROBABLE CAUSE?

2. WAS THE JUNE 16, 1980 INSPECTION WARRANT OVERBROAD?

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[2] Hern had not allowed warrantless entries by OSHA compliance officers on February 20, 1975 and on March 30, 1978. (A brief inspection was conducted, however, July 8-9, 1975 in response to a court order.)

DISCUSSION

I. PROBABLE CAUSE FOR ISSUANCE OF THE JUNE 16, 1980 INSPECTION WARRANT.

[1] Hern contends that the employee complaint dated March 16, 1979 could not provide probable cause for issuance of a warrant on June 16, 1980, some 15 months later. In support of this position, Hern relies on cases pertaining to standards of probable cause for issuance of search warrants in criminal proceedings. *See, e.g., Sgro v. United States*, 287 U.S. 206, 211-12, 53 S.Ct. 138, 140; 77 L.Ed. 260 (1932); *Schoeneman v. United States*, 317 F.2d 173, 177 (D.C.Cir.1963).

In *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), however, the Supreme Court held that warrants for OSHA inspections need not be based on "probable cause in the criminal law sense." *Id.* at 320, 98 S.Ct. at 1824. Subsequently "virtually every federal court . . . has concluded that criminal probable cause is not required for issuance of a warrant for an OSHA inspection based on employee complaints." *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1318 n.6 (7th Cir. 1980). *See Plum Creek Lumber Co. v. Hutton*, 608 F.2d 1283, 1287-88 (9th Cir. 1979).

In determining the degree of simultaneity needed for filing of an employee complaint and issuance of an OSHA warrant, courts have applied a more relaxed standard of probable cause than that required for criminal warrants. *See, e.g., Burkart, supra*, 625 F.2d at 1322 (employee complaints received six months and five months prior to issuance of OSHA warrant "did not render . . . information stale."); *B. P. Oil, Inc. v. Marshall*, 509 F.Supp. 802, 806 (E.D. Pa.1981) (not necessary to show that violation was in existence at precise time warrant issued); *In the Matter of the Inspection of Central Mine Equipment Co.*, 7 OSHC (BNA), 1185, 1189 (E.D.Mo.), *vacated on other grounds*, 7 OSHC (BNA) 1907 (8th Cir. 1979) (upholding OSHA warrant based on information eight months old).

In *Federal Casting Div. Chromalloy American Corp. v. Donovan*, 514 F.Supp. 617, 618-19 (E.D.Wis.1981) a Wisconsin

district court upheld a foundry inspection warrant, pursuant to a general administrative plan, based on a 32-month-old complaint, stating:

> "It seems clear that companies cannot be allowed to prevent inspections by litigating the validity of a warrant through every available channel, and then when the warrant is upheld, avoid the inspection by litigating whether a once-valid warrant has become stale. If that were the law and were OSHA required to obtain a second 'fresh' warrant, nothing would prevent . . . additional years of litigation on the second warrant. To allow such a result would thwart the essential purposes of the Occupational Safety and Health Act of 1970 which was 'to assure so far as possible every working-man and woman in the nation safe and healthful working conditions.' "

The court recognized, however, that "[i]f the warrant had been based on a specific employee complaint, the company's arguments derived from the criminal law on the staleness of warrants would have more force." *Id.* at 619.

Although the warrant here issued pursuant to a specific complaint, Hern's contention of staleness has little merit. While the government was careless in drafting the first warrant and serving the second, Hern, through its own occlusive tactics, was chiefly responsible for the 15-month delay of which it now complains.

We conclude that the employee complaint of March 16, 1979 supported issuance of the June 16, 1980 warrant.

II. BREADTH OF THE JUNE 16, 1980 INSPECTION WARRANT.

Hern contends that the employee complaint alleging safety hazards in the "metal pouring area" does not support a warrant to search the entire Hern foundry.

In *J. R. Simplot Co. v. OSHA*, 640 F.2d 1134 (9th Cir. 1981), the Ninth Circuit upheld a full-scale OSHA inspection based on an employee complaint noting that circuits have reached inconsistent results in addressing the issue whether such an

inspection "must be restricted to the complained of site." *Id.* at 1137. In *Marshall v. North American Car Co.*, 626 F.2d 320, 324 (3d Cir. 1980) the Third Circuit concluded that "where an OSHA inspection is conducted under § 8(f) pursuant to an employee complaint, the scope of the inspection must bear an appropriate relationship to the violations alleged in the complaint." By contrast, the Seventh Circuit in *Burkart, supra,* 625 F.2d at 1325 held that "where probable cause to conduct an OSHA inspection is established on the basis of employee complaints, the inspection need not be limited in scope to the substance of those complaints."[3]

Declining to formulate a general rule for scope of OSHA warrants, the *Simplot* court stated that, "facts here require us to do no more than determine the legitimate breadth of the warrant issued by the district court." *Simplot, supra,* 640 F.2d at 1138. In reviewing the warrant application the court determined that the district court had reasonably inferred that the Simplot plant was located in a single facility. A warrant authorizing inspection of the entire Simplot plant was therefore not found to be overbroad.

[2] Turning to the warrant application in the instant case, we find no lack of reasonableness in the magistrate's issuance of a warrant to search the entire Hern foundry. The June 12, 1980 application was "in response to an employee safety and health complaint submitted pursuant to section 8(f)(1) of the Act *and as a part of an inspection program designed to assure compliance with the Act.*"[4] (emphasis added.) The affidavit verifying the employee complaint alleged safety hazards including ventilation

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[3] Decisions from district and administrative law courts have been equally divided. *Compare Public Service Co., Inc. v. United States EPA,* 509 F.Supp. 720 (S.D.Ind.1981) (upholding broad search) *with Matter of Establishment Inspection of Asarco, Inc.,* 508 F.Supp. 350, 353 (N.D.Tex.1981) ("Section 8(f)(1) must bear an appropriate relationship to the violations alleged in the underlying employee complaints.") *Compare* Sarasota Concrete Co. 1979 OSHD ¶ 23,839 (OSH Rev. Comm'n, Sept. 9, 1979), *with* Seaward Int'l, Inc., 1979 OSHD ¶ 24,794 (W.D.Va., Sept. 19, 1980).

[4] OSHA Instruction CPL 2.12A establishes guidelines for evaluating employee complaints. Under section F2 officers are "to determine the nature and severity of the hazard; the number of employees potentially exposed; and any injuries, illnesses, or symptoms attributable to the hazard." If "[a] thorough evaluation of a complaint does not establish 'reasonable grounds to believe a violation or danger exists,' " . . . [or] "[a]s a result of a recent inspection or on the basis of

defects in the foundry. The magistrate could reasonably have inferred that inspection of the entire Hern establishment was necessary to detect ventilation hazards. Further, there was no information before the magistrate indicating that the Hern foundry was a multi-faceted establishment or that it was of such a large size that full-scale inspection of the premises was unreasonable.[5]

The Supreme Court has cautioned that "[d]elineating the scope of a search . . . is particularly important where documents are involved." *Barlow's, supra,* 436 U.S. at 324, 98 S.Ct. at 1826 n.22; *Blocksom & Co. v. Marshall,* 582 F.2d 1122, 1125 (7th Cir. 1978). We note that inspection of documents in the instant case was properly restricted to those "records, files, papers . . . bearing on whether this employer is . . . furnishing to its employees . . . a place of employment which [is] free from recognized hazards that are causing or likely to cause death or serious physical harm."

CONCLUSION

Facts of the instant case viewed in light of OSHA's purpose in promoting employee safety persuade us to adopt the reasoning of the Seventh Circuit: "[T]he better view is that which permits,

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other objective evidence, the Area Director determines that the hazard which is the subject of the complaint is not present or has been corrected," then no inspection will be conducted. (Section H2a-c). These guidelines protect commercial property owners from "unbridled discretion [of] executive and administrative officers." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323, 98 S.Ct. 1816, 1825, 56 L.Ed.2d 305 (1978), by assuring that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967).

[5] While the Supreme Court has acknowledged that "the expectation of privacy . . . the owner of commercial property enjoys . . . differs significantly from the sanctity accorded an individual's home. [sic]" *Donovan v. Dewey,* _____ U.S. _____, _____, 101 S.Ct. 2534, 2538, 69 L.Ed.2d 262, 269 (1981), the Court has repeatedly underscored the requirement of reasonableness in administrative searches. *See Donovan v. Dewey, supra; Marshall v. Barlow's, Inc., supra,* 436 U.S. at 315-16, 98 S.Ct. at 1821; *Camara v. Municipal Court, supra,* 387 U.S. at 539, 87 S.Ct. at 1736; *See v. Seattle,* 387 U.S. 541, 544-45, 87 S.Ct. 1737, 1739, 18 L.Ed.2d 943 (1967).

absent extraordinary circumstances, general inspections in response to employee complaints." *Burkart, supra,* 625 F.2d at 1324.

The contempt order of the district court is AFFIRMED.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In the Matter of	)	
	)	
Establishment Inspection of:	)	CIVIL NO. M-N-2017
	)	
HERN IRON WORKS, INC.	)	**ORDER OF CONTEMPT**
Atlas Road	)	
Coeur d'Alene, Idaho	)	
	)	

The Court having heretofore stated its findings of fact and conclusions of law finding that the Respondent, Hern Iron Works, Inc., is in contempt of an Order of this Court, now there,

IT IS THEREFORE ORDERED

1) The Respondent, Hern Iron Works, Inc., is found in contempt of this Court for its deliberate refusal to obey a Warrant for Inspection issued by this Court;

2) The Respondent, Hern Iron Works, Inc., shall pay a fine of $1,000.00;

3) The Warrant for Inspection issued by this Court on June 16, 1980, shall remain in effect until further order of this Court; and

4) The fine of $1,000.00 shall be set aside if, within ten days of entry of this Order, the Respondent indicates by advice both to the Court and counsel for the applicant its willingness to obey the Warrant for Inspection.

Dated August 14th, 1980.

/s/ Ray McNichols
RAY McNICHOLS
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ William W. Kates
William W. Kates

EXHIBIT D

Robert A. Friel
Associate Regional Solicitor
William W. Kates, Attorney
Office of the Solicitor
U.S. Department of Labor
8003 Federal Office Building
Seattle, Washington 98174
(206) 442-0940

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In the Matter of	)	
	)	CIVIL NO. M-S-2327
Establishment Inspection of	)	
	)	
LEWIS YOUNGSTROM, an	)	
individual, doing business as	)	**ORDER OF CONTEMPT**
YOUNGSTROM'S LOG HOMES	)	
U.S. Highway 91	)	
Blackfoot, Idaho	)	
	)	

This matter having come on for hearing on April 13, 1981, upon the Application of the Secretary of Labor, United States Department of Labor, for an Order finding the Respondent, Lewis Youngstrom, an individual doing business as Youngstrom's Log Homes, in contempt of Court, and the Court having heretofore stated its findings of fact and conclusions of law,

IT IS THEREFORE ORDERED:

1) The Respondent, Lewis Youngstrom, an individual doing business as Youngstrom's Log Homes, is in contempt of this Court for his deliberate refusal to obey a Warrant for Inspection issued by this Court;

2) The Respondent shall pay a fine, which is hereby imposed, of $500.00 for such contempt;

3) The Warrant for Inspection issued by this Court on December 1, 1980, shall remain in effect until further order of this Court;

4) The imposition of the fine of $500.00 shall be suspended during the pendency of any appeal of this Order;

5) The Respondent may purge himself of contempt, and the fine of $500.00 shall then be set aside, through allowing a safety and health inspection of his worksite to be conducted as authorized by the Warrant for Inspection.

Dated April 17, 1981.

/s/ Fred M. Taylor
Fred M. Taylor
United States District Judge

Presented by:

/s/ William W. Kates
William W. Kates

EXHIBIT E

Robert A. Friel
Associate Regional Solicitor
William W. Kates, Attorney
U.S. Department of Labor
8003 Federal Office Building
Seattle, Washington 98174
(206) 442-0940

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

In the Matter of	)	
	)	
Establishment Inspection of:	)	CIVIL NO. M-N-2017
	)	
HERN IRON WORKS, INC.	)	**APPLICATION FOR**
	)	**REISSUANCE**
		OF INSPECTION
Atlas Road	)	**WARRANT**
Coeur d'Alene, Idaho	)	
	)	

COMES NOW Ray Marshall, Secretary of Labor, United States Department of Labor, acting through the Occupational Safety and Health Administration, by and through the undersigned Attorney, and applies to this Court for the reissuance of an inspection warrant pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*), hereinafter referred to as the Act, and in support of such Application alleges, upon information and belief, as follows:

1. That this Court, in response to an earlier Application for an Inspection Warrant (dated June 14, 1979) issued a Warrant for Inspection on June 22, 1979, against HERN IRON WORKS, INC., the Respondent herein. Such Warrant for Inspection was not properly served upon a responsible managing official of the corporate Respondent in a

manner sufficient for the Warrant for Inspection to be further enforced by this Court, whether by contempt proceedings or otherwise. For that reason this Application for the reissuance of a Warrant for Inspection against the Respondent, HERN IRON WORKS, INC., is being made.

2. That Hern Iron Works, Inc., is a corporation duly organized and existing under the laws of the State of Idaho and is engaged in the operation of a worksite and business located on Atlas Road approximately two miles north of the Atlas Tie Plant in Coeur d'Alene, Idaho (with a mailing address of Route 1, Box 240, Coeur d'Alene, Idahc 83814), where work is performed by employees of the employer engaged in the operation of a foundry at which moulded iron castings of various sizes and shapes are produced for customers both within and outside the State of Idaho, such castings including grates, parts for stoves and miniature cannons, and is otherwise engaged in a business affecting commerce within the meaning of Section 3 of the Act. This has been true at all times pertinent hereto.

3. That the desired inspection and investigation are contemplated in response to an employee safety and health complaint submitted pursuant to Section 8(f)(1) of the Act and as a part of an inspection program designed to assure compliance with the Act and are authorized by Section 8(a) of the Act, all as more fully described in the affidavit of Donald R. Brzowski, on file herein (such Affidavit having been previously filed with the Court as an attachment to the initial Application for an Inspection Warrant dated April 9, 1979).

4. That the inspection and investigation will be conducted during regular working hours or at other reasonable times, within reasonable limits, and in a reasonable manner, all as set forth in the regulations pertaining to such inspections promulgated by the Secretary of Labor at 29 C.F.R. Part 1903. Appropriate credentials as representatives of the Occupational Safety and Health Administration, U.S. Department of Labor, hereinafter referred to as representatives, will be presented to the employer, and the inspection

and investigation will be commenced as soon as practicable after the issuance of this warrant and will be completed with reasonable promptness.

5. That the inspection and investigation will extend to the aforesaid establishment or other area, workplace, or environment where work is performed by employees of the employer, and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations and orders pursuant to the Act.

6. That the representatives may be accompanied by one or more employees of the employer, pursuant to Section 8(e) of the Act.

7. That a return will be made to the Court at the completion of the inspection and investigation.

WHEREFORE, applicant prays that this Court enter a Warrant for Inspection in the form as annexed hereto.

DATED this 12th day of June, 1980.

Carin A. Clauss
Solicitor of Labor

Daniel W. Teehan
Regional Solicitor

Robert A. Friel
Associate Regional Solicitor

William W. Kates
Attorney

By /s/William W. Kates
William W. Kates
U.S. Department of Labor

EXHIBIT F

AFFIDAVIT

STATE OF IDAHO)
) ss.
COUNTY OF KOOTENAI)

DONALD R. BRZOWSKI, being first duly sworn on oath, deposes and says:

1. That I am now and at all times material hereto have been a Compliance Safety and Health Officer of the Occupational Safety and Health Administration (OSHA), United States Department of Labor, with offices at 205 North First Street in Coeur d'Alene, Idaho. My duties and responsibilities as a Compliance Safety and Health Officer include the making of safety and health inspections of worksites under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C. sections 651 *et seq.*), hereinafter referred to as the "Act".

2. That on June 29, 1979, I went in the normal course of my duties to the work establishment maintained by Hern Iron Works, Inc., located on Atlas Road in Coer [sic] d'Alene, Idaho. The purpose of our visit was to serve a Warrant for Inspection which had been issued on June 22, 1979, against the aforesaid employer and to conduct a safety and health inspection of such establishment, in accordance with the Warrant for Inspection and pursuant to authority of section 8 of the Act and instructions from the Area Director, Boise, Idaho area office.

3. Upon my arrival at the worksite at approximately 10:00 a.m., I entered the office building and after giving my name and identifying myself as being with OSHA, I asked the office lady if I could see Mr. John A. Hern, Jr., the person with whom I had dealt in my previous inspection activities at the worksite. She stated that Mr. Hern was in the foundry building and attempted to call him there. When there was no response to her call, she asked another gentleman in the office if he would go to the foundry and try to locate Mr. Hern. Shortly thereafter that gentleman

returned to the office and said that he could not find Mr. Hern. After another unsuccessful call to the foundry building, I asked the office lady who was in charge in Mr. Hern's absence. She indicated the gentleman who had earlier gone to the foundry to try to locate Mr. Hern. I then asked that gentleman, who identified himself as Mr. Dan Brockway, the sales manager of the firm, if I could speak with him and we went into his office. I then introduced myself to Mr. Brockway and presented to him my credentials as an OSHA Compliance and Safety Officer. I informed Mr. Brockway that I had in my possession a warrant authorizing a safety and health inspection of the worksite and I asked him if in Mr. Hern's absence he would permit me to make the inspection. Again he stated that he would go to the foundry to try to locate Mr. Hern. When Mr. Brockway returned and stated that he still could not find Mr. Hern, I presented to him a copy of the Warrant for Inspection and again asked if he would permit me to make the inspection. Mr. Brockway said that he could not as he did not have the authority to permit it. I said that I would have to accept his comments as a refusal to honor the warrant. After noting the refusal in my report, I gave Mr. Brockway one of my business cards so that Mr. Hern could call me if he had any questions. I then left the worksite at approximately 10:40 a.m.

4. I returned to the worksite at approximately 1:30 p.m. that afternoon in a further attempt to see Mr. Hern and make the inspection. When the office lady told me that Mr. Hern was not at the worksite, I asked to see Mr. Brockway. I asked him if he had had a chance to discuss my visit earlier that morning with Mr. Hern. He said that he had and that Mr. Hern said that he would handle the matter himself. I then asked Mr. Brockway if his position (namely, that of refusing to permit a safety and health inspection) was the same, and he said that it was. I said that I had expected that Mr. Hern would call me. Mr. Brockway said that Mr. Hern had been "under the weather" for the past few days and was at home now because of that. Mr. Brockway also

said that Mr. Hern had told him that he had done the correct thing by refusing to permit an inspection. At this point I again left the premises.

5. My entry into the worksite for the purpose of making a safety and health inspection was not refused by reason of unreasonable time, limit, manner, or any other basis provided for by the Act, but was refused solely for reasons stated above. At all times, Mr. Brockway was polite and cordial in his dealings with me and I served the Warrant for Inspection and attempted to make the safety and health inspection.

Dated July 16, 1979

/s/ Donald R. Brzowski
Donald R. Brzowski

SUBSCRIBED AND SWORN to before me this 16 day of July, 1979.

/s/
NOTARY PUBLIC in and for the State of Idaho, residing in Kootenai Co., Id.

My Commision expires: 10-26-79

EXHIBIT G

This form is prepared for the assistance of any complainant and is not intended to constitute the exclusive means by which a complaint may be registered with the U.S. Department of Labor.

Form Approved
O.M.B. No 044R144

Sec. 8(i)(1) of the Williams-Steiger Occupational Safety and Health Act, 29 U.S.C. 651, provides as follows: Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

NOTE: Section 11 (c) of the Act provides explicit protection for employees exercising their rights, including making safety and health complaints.

	For Official Use Only		
	Area	Date Received	Time
	0160	3/23/79	2:30 P
	Region	Received By	Formal ☐
	10	LL	Non Formal ☑

The undersigned *(check one)*

☐ Employee ☑ Representative of Employee ☐ Other *(specify)* _____

believes that a violation at the following place of employment of an occupational safety or health standard exists which is a job safety or health hazard.

Employer's Name
Hern Iron Works

Employer's Address *(Street)* *(City)*
Atlas Road Coeur d'Alene

(State) (Zip Code) Telephone
Idaho

1. Kind of business
Foundry

2. Specify the particular building or worksite where the alleged violation is located, including address.

Metal pouring section of plant

3. Specify the name and phone number of employer's agent(s) in charge.

plant manager

4. Describe briefly the hazard which exists there including the approximate number of employees exposed to or threatened by such hazard.

1. Without instruction or protective equipment or clothing employees required to pour molten metal

No ventilations system in the foundry area

5. (a) To your knowledge is this condition being considered by any other Government agency, or has it been considered by any other Government agency?

Yes ☐ No ☑

5. (b) If yes, and you know, which Government agency?

6. Has this condition been brought to the attention of the employer?

Yes ☐ No ☐ Don't know ☑

7. Please indicate your desire.

☑ I *do not* want my name revealed to the employer. ☐ My name *may be* revealed to the employer.

EXHIBIT H

Robert A. Friel
Associate Regional Solicitor
William W. Kates, Attorney
U.S. Department of Labor
8003 Federal Office Building
Seattle, Washington 98174
(206) 442-0940

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

In the Matter of	)	
	)	
Establishment Inspection of:	)	CIVIL NO. M-N-2017
	)	
HERN IRON WORKS, INC.	)	**WARRANT FOR**
Atlas Road	)	**INSPECTION**
Coeur d'Alene, Idaho	)	
_____	)	

To: Area Director
Boise, Idaho Area Office
Occupational Safety and Health Administration
U.S. Department of Labor

Application having been made, and Court finding there is sufficient cause to permit entry for inspection and investigation at the establishment and workplace described as:

Hern Iron Works, Inc.
Atlas Road
Coeur d'Alene, Idaho

IT IS HEREBY ORDERED that pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, *et seq.*), hereinafter referred to as the Act, YOU or OTHER DULY DESIGNATED REPRESENTATIVES of the Occupational Safety and Health Administration, U.S. Department of Labor, ARE AUTHORIZED to enter the above described premises during regular working hours or at other reasonable times,

and to inspect, to take environmental samples and photographs related to the purpose of the inspection, and to investigate in a reasonable manner and to a reasonable extent, the aforesaid worksite and business where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to its employees and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act.

A return shall be made to this Court showing that the inspection has been completed, within fifteen (15) days after completion thereof.

DATED this 16th day of June, 1980.

/s/ Ray McNichols
UNITED STATES
DISTRICT JUDGE

Presented by:

/s/ William W. Kates
William W. Kates

RETURN

Inspection of the establishment described in this warrant was made on _____.

_____
Compliance Safety &
Health Officer
Occupational Safety and
Health Administration
U.S. Department of Labor

EXHIBIT I

Robert A. Friel
Associate Regional Solicitor
William W. Kates, Attorney
U. S. Department of Labor
8003 Federal Office Building
Seattle, Washington 98174
(206) 442-0940

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

In the Matter of	)	
	)	
Establishment Inspection of:	)	CIVIL NO. M-S-2327
	)	
LEWIS YOUNGSTROM, an	)	**APPLICATION FOR AN**
individual, doing business as	)	**INSPECTION WARRANT**
YOUNGSTROM'S LOG HOMES	)	
U. S. Highway 91	)	
Blackfoot, Idaho	)	
_____	)	

COMES NOW Ray Marshall, Secretary of Labor, United States Department of Labor, acting through the Occupational Safety and Health Administration, by and through the undersigned Attorney, and applies to this Court for an inspection warrant pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*), hereinafter referred to as the Act, and in support of such Application alleges, upon information and belief, as follows:

1. That Lewis Youngstrom, an individual doing business as Youngstrom's Log Homes, is engaged in the operation of a worksite and business located on U.S. Highway 91 approximately one mile south of the intersection of U.S. Highway 91 and Interstate Highway I-15, in Blackfoot, Idaho, within the jurisdiction of this Court, where work is performed by employees of the employer engaged in the

manufacture and sale of log beams and other building components used in log homes, such activities being performed through the use of equipment and materials obtained in part from sources outside the State of Idaho, and is otherwise engaged in a business affecting commerce within the meaning of Section 3 of the Act. This has been true at all times pertinent hereto.

2. That the desired inspection and investigation are contemplated in response to an employee safety and health complaint requesting such an inspection pursuant to Section 8(f)(1) of the Act and as a part of an inspection program designed to assure compliance with the Act, and are authorized by Section 8(a) of the Act, all as more fully described in the affidavit of Jack M. Haning, which affidavit is attached hereto and incorporated herein by this reference.

3. That the inspection and investigation will be conducted during regular working hours or at other reasonable times, within reasonable limits, and in a reasonable manner, all as set forth in the regulations pertaining to such inspections promulgated by the Secretary of Labor at 29 C.F.R. Part 1903. Appropriate credentials as representatives of the Occupational Safety and Health Administration, U.S. Department of Labor, hereinafter referred to as representatives, will be presented to the employer, and the inspection will be commenced as soon as practicable after the issuance of this warrant and will be completed with reasonable promptness.

4. That the inspection and investigation will extend to the aforesaid establishment or other area, workplace, or environment where work is performed by employees of the employer, and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether this

employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations and orders issued pursuant to the Act.

5. That the representatives may be accompanied by one or more employees of the employer, pursuant to Section 8(e) of the Act.

6. That a return will be made to the Court at the completion of the inspection and investigation.

7. That on November 3, 1980, at the aforesaid location, duly designated representatives of the Secretary of Labor, pursuant to and in accordance with the Act, presented themselves to the owner, operator, or agent in charge thereof for the purpose of conducting a safety and health inspection at said location under the authority of the Act. At the attempt to carry out said purpose, said representatives were refused entry upon the premises by Mr. Lewis Youngstrom. More particular details of such refusal are set forth in the aforesaid affidavit of Jack M. Haning.

WHEREFORE, the applicant prays that this Court enter a Warrant for Inspection in the form as annexed hereto.

DATED this 26th day of November, 1980.

Carin A. Clauss
Solicitor of Labor

Daniel W. Teehan
Regional Solicitor

Robert A. Friel
Associate Regional Solicitor

William W. Kates
Attorney

By /s/William W. Kates
William W. Kates

U.S. DEPARTMENT OF LABOR

EXHIBIT J

AFFIDAVIT

STATE OF IDAHO)
) ss
COUNTY OF BANNOCK)

JACK M. HANING, being first duly sworn on oath, deposes and says:

1. That I am now and at all times material hereto have been a Compliance Safety and Health Officer of the Occupational Safety and Health Administration (OSHA), United States Department of Labor, with offices at 250 South Fourth, Suite 178, Pocatello, Idaho 83201. My duties and responsibilities as a Compliance Safety and Health Officer include the making of safety and health inspections of worksites under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C.A. section 651 *et seq.*), hereinafter referred to as the "Act".

2. That on November 3, 1980, Mr. Garney B. Coffey, another Compliance Safety and Health Officer, and I arrived at the work establishment maintained by Lewis Youngstrom, an individual doing business as Youngstrom's Log Homes, and located on U.S. Highway 91 approximately one mile south of the intersection of U.S. Highway 91 and Interstate Highway I-15 in Blackfoot, Idaho. The purpose of our visit was to conduct a safety and health inspection of such establishment, pursuant to the authority of section 8 of the Act and instructions from my supervisor in the Boise, Idaho area office.

3. That the inspection was attempted to be made in response to a complaint alleging possible violations of the Act and requesting such an inspection, all pursuant to section 8(f)(1) of the Act. Such complaint was made on October 27, 1980, through a telephone call from an employee of Youngstrom's Log Homes and received by myself in the Pocatello OSHA office. In the course of my telephone discussion with the complainant, Mr. Richard Mangum, he

advised me that he had suffered an accident at the worksite on October 21, 1980, and was presently in Bingham Memorial Hospital in Blackfoot, Idaho. In light of the seriousness of the injuries he had suffered, I then went to the hospital in Blackfoot to interview the complainant.

4. That upon my arrival at the hospital at approximately five o'clock in the afternoon of October 27, 1980, I met with Mr. Mangum in his room. He told me that he had injured his foot on the afternoon of October 21, 1980, when it became caught in an unguarded chain sprocket on a debarker machine. He further told me that surgery had been performed on the afternoon of October 21, but that such surgery had not been successful and that he was scheduled for additional surgery on October 28 to amputate his big toe and an additional toe. Mr. Mangum is a twenty-three year old male who stated that he had been working at Youngstrom's Log Homes since September of this year in his current employment and that he had worked there on previous occasions also. During the course of our discussions, I prepared a complaint form from the information he provided, which complaint form Mr. Mangum then signed. A copy of such complaint is attached hereto.

5. That at approximately 3:00 p.m. on November 3, 1980, Mr. Coffey and I arrived at the worksite of Youngstrom's Log Homes. Upon our arrival we met Mr. Lewis Youngstrom, who I knew from previous visits to the worksite to be the owner of the firm. We introduced ourselves to him and presented to him our credentials as Compliance Safety and Health Officers with OSHA. We explained to him the purpose of our visit, which was to make a safety and health inspection of the worksite pursuant to a complaint we had received. He asked if the complaint had anything to do with a recent foot injury to an employee. I advised Mr. Youngstrom that such matter was among the items mentioned in the complaint. Mr. Youngstrom said that he would be willing to let us look at the debarker, but he then asked if we were going to inspect any things not involving the accident. I advised him that we intended to inspect and investigate all

the matters mentioned in the complaint. Mr. Youngstrom then stated that he would have to refuse us entry, and that we would have to get a warrant. We then left the premises.

6. Our entry into the worksite for the purpose of making a safety and health inspection was not refused by reason of unreasonable time, limit, manner or any other basis provided for by the Act, but was refused solely for reasons stated above.

7. From my observations and discussions while at the worksite and from previous visits, I believe the nature of the business of Youngstrom's Log Homes consists of the manufacture and sale of log beams and other building components used in log homes, such activities being performed through the use of equipment and materials obtained in part from sources outside the State of Idaho.

DATED November 17, 1980.

/s/ Jack M. Haning
JACK M. HANING

SUBSCRIBED AND SWORN to before me this 17th day of November, 1980.

/s/_____
NOTARY PUBLIC in and for the State of Idaho, residing at Downey, Id.

My Commission expires:

3-11-81

EXHIBIT K

This form is prepared for the assistance of any complainant and is not intended to constitute the exclusive means by which a complaint may be registered with the U.S. Department of Labor.

Form Approved
O.M.B. No 044R144

Sec. 8(i)(1) of the Williams-Steiger Occupational Safety and Health Act, 29 U.S.C. 651, provides as follows: Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

NOTE: Section 11 (c) of the Act provides explicit protection for employees exercising their rights, including making safety and health complaints.

	For Official Use Only		
	Area	Date Received	Time
913	0160	10/27/80	5:00 P
	Region	Received By	
sic 2431	10	Gen/DB	Formal ☑
			Non Formal ☐

The undersigned *(check one)*

☑ Employee ☐ Representative of Employees ☐ Other *(specify)* _____

believes that a violation at the following place of employment of an occupational safety or health standard exists which is a job safety or health hazard.

Employer's Name

Youngstrom Log Homes

Blackfoot

Employer's Address *(Street)* *(City)*

Idaho

83221

(State) (Zip Code)

Telephone

785-0632

1. Kind of business

Log Homes

2. Specify the particular building or worksite where the alleged violation is located, including address.

3. Specify the name and phone number of employer's agent(s) in charge.
Lewis Youngstrom, Owner

4. Describe briefly the hazard which exists there including the approximate number of employees exposed to or threatened by such hazard.

1. Inadequate hearing protection [text illegible in copy]
2. No one trained in first aid [text illegible in copy]
3. Chain & sprockets on log peeler not guarded.
4. Trim saws not guarded [text illegible in copy]
5. Fan on 10" lathe not guarded [text illegible in copy]
6. Grinders electrical cords — wires directly plugged in
7. Guarding of most equipment inadequate
8. Creosote log ends

5. (a) To your knowledge is this condition being considered by any other Government agency, or has it been considered by any other Government agency?

Yes ☐ No ☐

5. (b) If yes, and you know, which Government agency?

6. Has this condition been brought to the attention of the employer?
Yes ☐ No ☐ Don't know ☐

7. Please indicate your desire.
☐ I *do not* want my name revealed to the employer. ☑ My name *may be* revealed to the employer.

NOTE: It is unlawful to make any false statement, representation or certification in any document filed pursuant to the Occupational Safety and Health Act of 1970. Violations can be punished by a fine of not more than $10,000, or by imprisonment of not more than six months, or by both. (Section 17(g))

Signature Richard S. Mangum Date 10/27/80

Typed or Printed Name Richard Mangum

Address *(Street)* 724 Henderson Dr. Apt. 3 *(City)* Blackfoot

(State) ID *(Zip Code)* _____ Telephone _____

[Copy below is illegible]

EXHIBIT L

Robert A. Friel
Associate Regional Solicitor
William W. Kates, Attorney
Office of the Solicitor
U.S. Department of Labor
8003 Federal Office Building
Seattle, Washington 98174
(206) 442-0940

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In the Matter of	)	
	)	
Establishment Inspection of:	)	CIVIL NO. M-S-2327
	)	
LEWIS YOUNGSTROM,	)	**WARRANT FOR**
an individual doing business as	)	**INSPECTION**
YOUNGSTROM'S LOG HOMES	)	
U.S. Highway 91	)	
Blackfoot, Idaho	)	
_____	)	

To: Area Director
Boise Idaho Area Office
Occupational Safety and Health Administration
U.S. Department of Labor

Application having been made, and the Court finding there is sufficient cause to permit entry for inspection and investigation at the establishment and workplace described as:

Youngstrom's Log Homes
Manufacturing Worksite
U.S. Highway 91
Blackfoot, Idaho

IT IS HEREBY ORDERED that pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, *et seq.*), hereinafter referred to as the Act, YOU or OTHER DULY DESIGNATED REPRESENTATIVES of the Occupational Safety and Health Administration, U.S. Department of

Labor, ARE AUTHORIZED to enter the above described premises during regular working hours or at other reasonable times, and to inspect, to take environmental samples and photographs related to the purpose of the inspection, and to investigate in a reasonable manner and to a reasonable extent, the aforesaid worksite and place of business where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to its employees, and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act.

A return shall be made to this Court showing that the inspection has been completed, within fifteen (15) days after entry hereof.

Dated this 1st day of December, 1980.

/s/ Ray McNichols
UNITED STATES
DISTRICT JUDGE

Presented by:

/s/ William W. Kates
William W. Kates

RETURN

Inspection of the establishment described in this warrant was made on _____.

_____
Compliance Safety &
Health Office
Occupational Safety and
Health Administration
U.S. Department of Labor

EXHIBIT M

[¶23,839] Sarasota Concrete Company

Text of Judge's Decision dated September 9, 1979. OSHRC Docket No. 78-5264. Cecil L. Cutler, Judge.

Inspection Warrants—Employee Complaints—Inspection Limited to Area of Complaint. The employer's motion to suppress evidence obtained in a wall-to-wall plant inspection based on an ex-employee's complaint about ready-mix concrete trucks was granted on grounds a warrant issued solely on an employee complaint of a specific hazard is not broad enough to authorize an overall inspection. The citation charging eleven nonserious violations, none involving the trucks, was vacated.

There was no showing as required under *Barlow's* that the employer was chosen for the search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources or that it was a high hazard industry. No probable cause was established to authorize the Secretary to go beyond the specifics in the warrant application.

Review was directed on whether an employee complaint warrant inspection should be limited to the area complained of and whether evidence suppression is appropriate when the employer successfully challenges the lawfulness of a search warrant.

Charles Kelso, Michael C. Towers for the employer. Baruch A. Fellner and Bobbye D. Spears for the Secretary.

[Text of Judge's Decision]

CUTLER, Judge: Following an inspection of its workplace in Sarasota, Florida, on October 10, 1978, respondent was issued a citation alleging 11 nonserious violations pursuant to section 9(a) of the Occupational Safety and Health Act of 1970 (29 U. S. C. 651, *et seq.*, hereinafter the "Act").

Respondent has filed a motion to suppress all evidence obtained as a result of the inspection which was made under a warrant issued October 6, 1978.

The parties have agreed to stipulate the facts so that a ruling on the motion can be made on the record. Further, without admitting the violations, respondent states that, if the ruling on the motion is adverse to it, it would offer no evidence in rebuttal of the Secretary's evidence and, as to this, respondent would accept the citation of violations as tantamount to affidavits of the compliance officer for the purpose of the Secretary meeting his burden of proof.

The operative facts, as set forth in the stipulation, as [*sic*] as follows:

> "1. On March 17, 1978, an individual by the name of Samuel Storey filed a Complaint with the Occupational Safety & Health Administration, Tampa Area Office. [Not reproduced.]
>
> "2. At the time of the filing of the Complaint, Samuel Storey was not an employee of Sarasota Concrete. He had been fired on March 8, 1978.
>
> "3. On March 23, 1978, a Compliance Officer with the Occupational Safety & Health Administration requested entry upon the work place for inspection. He was advised that it is corporate policy to require an inspection warrant.
>
> "4. On October 6, 1978, the Area Director of the Occupational Safety & Health Administration, Tampa Division, filed with The United States Magistrate in the United States District Court for the Middle District of Florida, and 'application for administrative inspection warrant under the Occupational Safety & Health Act of 1970.' [Not reproduced.]
>
> "5. On October 6, 1978, the United States Magistrate, The Honorable Paul Game, Jr., issued a warrant ordering that the Area Director of the Occupational Safety & Health Administration or his authorized Compliance Officers be authorized to conduct an inspection and investigation of the work place of Sarasota Concrete Company. [Not reproduced.]

"6. On October 10, 1978, a Compliance Officer from the Occupational Safety & Health Administration appeared at the work place of Sarasota Concrete and served the Plant Manager with a copy of the warrant.

"7. The Plant Manager permitted the inspection ordered in the warrant.

"8. The Compliance Officer inspected the entire work place.

"9. As a result of the inspection a citation of violations, which is the subject matter of this litigation, issued citing 12 violations of standard regulations or sections of the Act.

"10. No penalty attached to any of the alleged violations.

"11. The Employer filed a timely Notice of Contest to each of the alleged violations.

"12. Corrective action was taken by Sarasota Concrete for each of the standards allegedly violated and notification of the corrections served on the Occupational Safety & Health Administration, Tampa Area Office. [Not reproduced.]

It also appears from the allied papers that none of the ready-mix concrete trucks — the subject of the complaint — were cited by the Secretary as a result of the inspection.

The primary issue in this case is whether the warrant issued upon the Secretary's application was overly broad and therefore probable cause did not exist with respect to evidence obtained to support the citation issued.

In *Marshall v. Barlow's Inc.*, 436 U. S. 307 (1978), the Supreme Court declared the Occupational Safety and Health Act of 1970 was unconstitutional insofar as it authorized inspection without warrants or their equivalent. The court ruled that, for the purposes of an administrative search under the Act, probable cause justifying the issuance of a warrant may be based upon: (1) specific evidence of an existing violation, or (2) a showing that

"reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular [establishment]" citing *Camara v. Municipal Court*, 387 U. S. 523 and [*sic*] 538 (1967). "A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect on [*sic*] employer's Fourth Amendment rights."

Barlow [*sic*], supra, requires that probable cause for an administrative search can be established either by (1) specific evidence of an existing violation or, alternatively, (2) a showing that reasonable legislative or administrative standards are satisfied with respect to a particular establishment.

The scope or extent of a search or inspection authorized by a warrant must, to accommodate the Fourth Amendment, be reasonable in light of the facts upon which the government interest in the search is based and all areas reasonably related to the subject matter of those facts.

In this case, the government relied upon the prong of *Barlow* [*sic*], *supra*, — an existing violation — to support its showing of probable cause. The application for the warrant does not allege that it is part of a specific inspection or investigation program designed to assure compliance with the Act. In other words, there is no showing that respondent's industry was in the "high risk" category or that there was a high rate of injuries, that it was the subject of previous citations, or other specific neutral criteria.

Several post-Barlow [*sic*] federal court decisions have addressed the issue of the sufficiency of a warrant under the Fourth Amendment requirement. *Central Mine Equipment Company*, 1979 CCH OSHD ¶23,309 (E. D. Mo. 1978), stands for the proposition that a warrant based on a specific employee complaint must be limited to an inspection of the particular hazard named in the complaint. In *Northwest Airlines, Inc.*, 587 F. 2d (7 CA. 1978), the court affirmed that, inasmuch as the Secretary's affidavit for the warrant did not provide the magistrate with

a particularized description and identity of an administrative or legislative program which would support an inspection of the entire workplace, the probable cause requirements were not met. The Seventh Circuit, in a later decision, *Weyerhauser Co. v. Marshall,* 1979 CCH OSHD ¶23,325, — F. 2d — (7th Cir. 1979), emphasized the importance of specificity in warrants and decried the use of "boilerplate" language in the application.

Probable cause was found in another case involving two respondents before the Seventh Circuit (*In the matter of Establishment Inspection of Gilbert and Bennett Manufacturing Co., and Marshall v. Chromalloy American Corp.,* 1979 CCH OSHD ¶23,243, — F. 2d — (7th Cir. 1979). In the *Gilbert and Bennett* case, there was an employee complaint and a history of OSHA violations. The *Chromalloy* case inspection was based upon a showing of high incidence of occupational injuries in the foundry industry. Likewise in *Dravo Corp. v. Marshall,* 5 BNA OSHC 2057, (DC W. D. Pa. 1977) affirmed 578 F. 2d 1373 (3rd Cir. 1978), there were a number of prior complaints and inspections involved.

Considering the present state of the law, I must conclude that a warrant issued solely upon an employee complaint and directed to a specific hazard is not broad enough to authorize an overall inspection. In this case there was no showing, as required under *Barlow* [*sic*], *supra,* that respondent was chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources. Thus, no probable cause was established to authorize the Secretary to go beyond the specifics detailed in his application for the warrant.

Respondent's motion to suppress evidence is granted. Citation Number 1 is vacated.

So Ordered.

Dated this 7th day of August, 1979.